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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 881

JOHN SITTNER, d/b/a SITTNER'S AUTO WRECKING; FRANK LENCI, d/b/a FRANK'S AUTO WRECKING CO.; FITZ AUTO PARTS, INC.; RIVERSIDE AUTO WRECKING; LINCOLN AUTO AND TRUCK WRECKING; TRUCK EQUIPMENT CO.; FERRILL'S AUTO WRECKING; EDWARD J. PRESTEK; M. BLOCH AND CO. INC.; BOB'S AUTO WRECKING; GENERAL AUTO AND TRUCK WRECKING; SEATTLE IRON AND METALS CORP.; LURIA BROS. AND CO., INC.; STERNOFF METALS CORP.; PACIFIC IRON AND METAL CO.; REX AUTO WRECKING; ANDERSON'S AUTO WRECKING; SOUTH END AUTO WRECKING; NEWTON AUTO PARTS; JOE W. MCCUTCHEN; COMMERCIAL TERMINALS CO.; M. G. VAN DYKE; SAM'S BONDED AUTO WRECKERS; L. E. SEXTON; and FARWEST AUTO WRECKING CO., INC., *Petitioners*,

vs.

CITY OF SEATTLE, a municipal corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE ARGUS PRESS, SEATTLE, WASHINGTON

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THE ARGUS PRESS, SEATTLE, WASHINGTON

INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Question Presented	3
Constitutional Provisions and Ordinances Involved	3
Statement	4
Reasons for Granting the Writ	7
Conclusion	11

Appendix A—Opinion of the Washington State Supreme Court	15
Appendix B—Order Directing Clarification	23
Appendix C—Seattle City Ordinance 90000	25

TABLE OF CASES

Sittner, et al., v. Seattle, 162 Wash. Dec. p. 819, 384 P.(2d) 859	2
State ex rel. McCue v. Sheriff of Ramsey County, 48 Minn. 236, 51 N.W. 112, 31 Am. St. Rep. 650	8-9, 10

STATUTES

25 Stat 676 (50 Cong. 1887-1889)	4
28 USC § 1257 (3)	2

CONSTITUTION

United States Constitution, Fourteenth Amendment	3

ORDINANCE

Seattle City Ordinance 90000	3, 4, 5, 6, 7, 8, 10

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vs.

CITY OF SEATTLE, a municipal corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above entitled case on August 29, 1963.

CITATIONS TO OPINIONS BELOW

The Opinion of the Washington State Supreme Court filed August 29, 1963, has not as yet been printed in the bound volumes of the Washington Reports. However, it is reported in 162 Washington Decisions, page 819, which is the "Official Advance Sheets of the Washington Reports." Also reported in 384 P.(2d) 859. Said Opinion is reproduced in Appendix "A." The order directing clarification of the Opinion of the Court (unreported) is printed in Appendix "B."

JURISDICTION

The judgment of the Supreme Court of the State of Washington was entered August 29, 1963 (R. 0059). A petition for rehearing was filed in a timely manner (R. 0066) and denied on November 7, 1963 (R. 0074). The Supreme Court of the State of Washington entered an order, staying the operation of its judgment to allow petitioners to file the petition for Writ of Certiorari with the Supreme Court of the United States of America (R. 0054). A timely application was made to extend the time for filing the Petition for Certiorari to March 6, 1964, which was granted by the Supreme Court of the United States of America by Order dated February 3, 1964. The jurisdiction of the court is invoked under 28 USC § 1257 (3), since the validity of an Ordinance of the City of Seattle, Washington, is drawn into question as being repugnant to the Fourteenth Amendment to the Constitution of the United States of America.

QUESTION PRESENTED

The sole question presented is whether Ordinance No. 90000 of the City of Seattle, Washington, contravenes the Fourteenth Amendment to the United States Constitution in that the Ordinance discriminates against the class of business operated by petitioners by excepting from its provisions a class of business operations which emit the same air contaminants as petitioners with no reasonable distinction between the classes involved.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The Constitution of the United States, as amended, provides among other things:

Amendment XIV § 1:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C. 1958 ed. p. XLVII.

Enabling Act by which Washington became a State, in § 4 provides:

> "That the delegates to the conventions * * * after the organization shall declare, on behalf of the people of said proposed states, that they adopt the constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and state governments, for said proposed states respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of

race or color, except as to Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence. * * * " United States Statutes At Large, Vol. 25, p. 676 (50th Congress 1887-1889).

Ordinance No. 90000 of the City of Seattle is set forth in Appendix "C."

STATEMENT

Petitioners commenced an action in the Superior Court of King County, State of Washington, seeking a declaratory judgment wherein petitioners sought to have Ordinance No. 90000 of the City of Seattle (relating to air pollution and regulating the emissions of air contaminants) be declared void as being discriminatory. The jurisdiction of the Supreme Court of the United States was invoked by praying that the Ordinance No. 90000 of the City of Seattle be declared void as discriminatory (R. 0001) and the same was finally decided adversely by the Supreme Court of the State of Washington in the opinion where the court held:

> "The plaintiffs have therefore failed to establish that the control exercised by the ordinance over their burning activities is discriminatory and in contravention of Art. 1 § 12 of the state constitution, and the fourteenth amendment to the federal constitution." (Appendix "C")

The petitioners consist of 26 individuals and corporations, 20 of which are engaged in the auto wrecking business and five of which are engaged in the iron and metal business. As an incident of their business operations, which are all located within the City of Seattle, they burn salvaged metals in order to prepare them for

reuse by foundries. Such scrap metal is desired by the foundries only if it is thoroughly cleaned. As the metal is cleaned by the burning process, smoke is emitted into the air.

Ordinance No. 90000 is entitled:

> "An Ordinance relating to air pollution, creating an air Pollution Control Advisory Board, regulating emissions of air contaminants, defining offenses and prescribing penalties." (Appendix "C")

Section 60 of Ordinance No. 90000 controls the emission of "smoke" by making it "unlawful to cause, suffer or allow emissions of smoke from any source *other than heat processing equipment*, the capacity of which is equal to or more than forty per cent," with certain exceptions relating to emissions for temporary periods of time. To measure the allowable opacity, the ordinance utilizes what is known as the Ringelmann Smoke Chart. (Italics ours.)

The Ordinance defines "smoke" as follows:

> "An air contaminant consisting of a visible air-borne concentration of combustion produced solid particles and other matter."

Section 80 of Ordinance No. 90000 controls the emission of "dust" from heat processing equipment or from the milling, grinding, crushing or handling of any material. Section 80 sets forth a table which provides for the maximum dust emissions allowable per hour in relation to the process weight per hour. It defines dust as:

> "An air contaminant consisting of solid particles, capable of being air-borne."

After a trial in the Superior Court for King County, State of Washington, the trial court entered Findings of Fact, specifically finding that the enforcement of Ordinance No. 90000 would result in the elimination of petitioners in their business of motor vehicle wrecking thereby causing great financial loss to petitioners; that there is excepted from Section 60 of the Ordinance heat processing equipment which is allowed to emit smoke of any opacity; that the Ringelmann Smoke Chart does not measure opacity, but only colorations of smoke, and, further, that the use of said chart is of no value whatsoever on those occasions where the emissions being measured contain water, vapor or steam; that smoke of less than 40% in opacity may be more dangerous and harmful than smoke of 40% opacity or more when the harm under consideration is limited to physical as opposed to aesthetic reflections; and that a logical and reasonable distinction in fact does exist between dust and smoke as defined in the ordinances (F. of F. III through VIII) (R. 0039-0041). The Trial Court, however, sustained the ordinance as constitutional and held that although the Ringelmann Smoke Chart does not measure opacity but only colorations, it was a reasonable standard of measurement (R. 0041). Petitioners appealed to the Supreme Court of the State of Washington which affirmed the judgment of the Trial Court and sustained Ordinance No. 90000 as constitutional (Appendix "A"). Petitioners filed a petition for rehearing which was denied by the State Supreme Court (R. 0066), the court, however, simultaneously therewith filed an order directing clarification (Appendix B) which overturned the Trial Court's Findings

of Fact that "a logical and reasonable distinction in fact does exist between dust and smoke as defined in the ordinance" on the ground that such Findings of Fact did not involve a factual issue but was a Conclusion of Law. This act of the State Supreme Court, however, is contrary to the record since two expert witnesses testified that such a distinction in fact existed (R. 0056, 0199).

REASONS FOR GRANTING THE WRIT

Petitioners contend that no reasonable basis exists for the classification set forth in the Ordinance No. 90000 in requiring the business operations of petitioners to be controlled by Section 60 thereof by the Ringelmann Smoke Chart while the heat processing equipment of another is controlled by the dust weight test with no control over the opacity of the smoke emitted by such operations .Here we have two industrial operations emitting smoke, one of which is controlled and the other is not. Such operations might have identical furnaces and smoke stacks, yet subject to discriminating regulations as to the opacity of smoke emitted by each in that one is regulated and the other totally unregulated.

The Trial Court found that compliance by these petitioners with Ordinance No. 90000 would be economically unfeasible because the cost to them is prohibitive (Finding No. III, R. 0040). The result is that the ordinance is confiscatory of their respective properties. They alone are compelled to purchase expensive equipment which may eliminate smoke generated by the conduct of their operations. The cost of this equipment

will run into hundreds of thousands of dollars. And yet, after either purchasing such equipment or being forced out of business, the factory next to them which is exempt from the smoke section of the ordinance may continue to emit the same identical type of smoke which these petitioners have been forced to eliminate.

The ordinance is directed at the control of two air contaminants, smoke and dust, which are not only defined separately in the ordinance, but which the evidence shows to be different (R. 0056, 0199) and which the Trial Court found to be separate and distinct. But petitioners (F. of F. No. VIII, R. 0041) whose operations emit smoke only are forbidden by Section 60 of Ordinance No. 90000 to emit such smoke having an opacity of over 40% or more but other manufacturing plants who are engaged in businesses which emit both smoke and dust are allowed to emit smoke of any opacity as long as they do not emit dust of a certain quantity.

If smoke is the air contaminant to be controlled, then the sources of that contamination are immaterial. Smoke from the furnaces of appellants is the same as the smoke from the class of business excepted from the Ordinance. There is no reasonable, logical or factual difference between smoke from these two sources but this ordinance discriminates against these petitioners by making it an economic hardship for them to continue in business but allows the next-door industrial plant to operate without any economic hardship and to emit smoke without control as to opacity.

Petitioners submit that the case of *State ex rel. Mc-*

Cue v. Sheriff of Ramsey County, 48 Minn. 236, 51 N.W. 112, 31 Am. St. Rep. 650, presented a parallel state of facts as compared to the case at bar. This case involved a city ordinance which, after prohibiting under penalty, the emission of dense smoke within the city, with certain limitations as to distance, location and surroundings, provided in § 3 that "nothing herein contained shall be construed to apply to manufacturing establishments, using the entire product of combustion, and the heat, power, and the light produced thereby, within the building, where they are generated within a radius of 300 feet therefrom." The court held that such ordinance was discriminatory and class legislation and said:

> "The provisions of section 3 are somewhat obscure; but the only fair and reasonable construction to be given it is that it is intended to except a class of manufacturers who limit the use of the heat, light, and power resulting from the combustion of smoke-producing material wholly within the prescribed radius. The counsel for the state contend that this must apply equally to all within the designated class, and that the exception thus made in the operation of the act is a reasonable one, because from the nature of the prescribed limitations, the public injury or annoyance from the emission of smoke from such establishments would not be serious or specially objectionable to the public. The argument applies in so far as the particular class who are excepted from the operation of the statute is concerned, but it does not reach the objection that the classification is not sufficiently broad. No arbitrary distinction between different kinds or classes of business can be sus-

tained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steampower is used in manufacturing, or is applied to other uses, as a grain elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable. Section 3 must be read in connection with section 1, and is evidently intended to be a limitation upon the latter section, and is so connected with it that its provisions must be regarded as inseparable from the general purpose and object of the act, so that the whole must stand or fall together."

While various courts have held valid ordinances which differentiated between dwelling houses and business operations or exempted locomotives and boats from the provisions of the ordinance, no ordinance other than the one involved in *McCue v. Sheriff of Ramsey County, supra*, differentiated between manufacturing and/or industrial plants and operations involving the same type of smoke such as in the case at bar. Ordinance No. 90000 of the City of Seattle will cause industrial and manufacturing plants operating under Section 60 thereof, such as petitioners, to cease operations while all that coming under Section 80 thereof can emit similar smoke of any opacity with no prohibition. The one becomes subject to the penalties of the ordinance; the other does not although smoke of similar opacity is involved.

CONCLUSION

Petitioners submit that no distinction exists between the two types of manufacturing plants insofar as the opacity of smoke is concerned, and for that reason the ordinance, under facts found by the Trial Court, is patently discriminatory in a prejudicial manner against petitioners in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States of America, and for that reason it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendices

Appendix A—Opinion of the Washington State Supreme Court 15
Appendix B—Order Directing Clarification 23
Appendix C—Seattle City Ordinance 90000 25

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN SITTNER, *et al.*, *Appellants*,
vs.
CITY OF SEATTLE, a municipal corporation, *Respondent*.

No. 36614
En Banc

Filed August 29, 1963.

This is an appeal from the dismissal of an action seeking a declaratory judgment in which plaintiffs (appellants) prayed that Ordinance No. 90000, section 60, of the defendant (respondent), city of Seattle, be declared void and, in addition, that the defendant be permanently enjoined from enforcing such section of the ordinance.

The plaintiffs consist of 25 individuals and corporations, 20 of which are engaged in the auto wrecking business and five of which are engaged in the iron and metal business. As an incident of their business operations, which are all located within the city of Seattle, they burn salvaged metals in order to prepare them for reuse by foundries. Such scrap metal is desired by the foundries only if it is thoroughly cleaned. As the metal is cleaned by the burning process, smoke is emitted into the air.

Ordinance No. 90000 is entitled:

> "AN ORDINANCE relating to air pollution, creating an air Pollution Control Advisory Board, regulating emissions of air contaminants, defining offenses and prescribing penalties."

Section 60 of Ordinance No. 90000 controls the emission of "smoke" by making it "unlawful to cause, suffer or allow emissions of smoke from any source other than heat processing equipment, the opacity of which is equal to or more than forty per cent," with certain exceptions relating to emissions for temporary periods of time. To measure the allowable opacity, the ordinance utilizes what is known as the Ringelmann Smoke Chart.

Smoke is defined as:

> "An air contaminant consisting of a visible air-borne concentration of combustion produced solid particles and other matter."

Section 80 of Ordinance No. 90000 controls the emission of "dust" from heat processing equipment or from the milling, grinding, crushing or handling of any material. Section 80 sets forth a table which provides for the maximum dust emissions allowable per hour in relation to the process weight per hour. It defines dust as:

> "An air contaminant consisting of solid particles, capable of being air-borne."

The plaintiffs contend section 60 of Ordinance No. 90000 is unconstitutional because the "opacity" standard used and the mandatory application of the Ringelmann Smoke Chart thereto does not have a reasonable relationship to the prevention of air pollution. It is their position that, first, the "opacity" standard does not measure the contents of the smoke, e.g., the toxic content thereof and, second, the Ringelmann Smoke Chart does not measure opacity but colorations of smoke.

An ordinance to be void for unreasonableness must be plainly and clearly unreasonable. *Seattle v. Hurst*, 50 Wash. 424, 97 Pac. 454 (1908). Although the "opacity" standard may not detect all of the air contaminants which pollute the air, we cannot say that it is not a reasonable means by which to detect some of the contaminating particles which smoke contains. It is no defense that the "opacity" standard does not regulate all air contamination but permits some emissions to go unpunished since a law designed to prevent one evil is not void because it does not prevent another. *Ballentine v. Nester*, 350 Mo. 58, 164 S.W.(2d) 378 (1942). Similarly, while it is true that the Ringelmann Smoke Chart measures coloration and not opacity, it does not necessarily follow that the chart may not be reasonably used as a basis for determining opacity. The Ringelmann Smoke Chart has been widely accepted throughout the United States as a measurement of air pollution by both legislatures and courts, and we find ourselves in agreement with the wisdom of this acceptance.

The trial court did not err in finding that the Ringelmann Smoke Chart is a reasonable standard of measurement and that, in respect to the "opacity" standard, section 60 of Ordinance No. 90000 is not unreasonable.

The plaintiffs contend section 60 of Ordinance No. 90000 is unconstitutional for the reason that the exemption of "heat processing equipment" from the restrictions of section 60, under which the plaintiffs are regulated, is arbitrary and capricious.

This contention requires the determination of whether the city of Seattle has made a reasonable

classification by exempting heat processing equipment from section 60. With respect to testing the constitutionality of legislative classifications, we stated in *Clark v. Dwyer,* 56 Wn.(2d) 425, 353 P.(2d) 941 (1960):

> "Article 1, § 12 of the state constitution and the fourteenth amendment to the Federal constitution, prohibiting special privileges and immunities and guaranteeing equal protection of the laws, require that class legislation must apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within, and those without, a designated class. Within the limits of these restrictive rules, the legislature has a wide measure of discretion, and its determination, when expressed in statutory enactment, cannot be successfully attacked unless it is manifestly arbitrary, unreasonable, inequitable, and unjust. . . ."

The plaintiffs contend that under section 60 of Ordinance No. 90000, they are forbidden to emit air contaminants in the form of smoke which exceeds 40 per cent opacity whereas heat processing equipment is permitted to contaminate the air with smoke in any amount it wishes. The defendant's reply to this contention is that the exemption of heat processing equipment from section 60 is not unreasonable inasmuch as it is, instead, directly controlled by section 80 which regulates the emission of dust from such equipment.

The plaintiffs' contention is premised on the assumption that dust and smoke are different air contaminants. An examination of the ordinance on its face appears to support the plaintiffs' contention since smoke and dust are defined and controlled separately. However, the

ordinance must be considered in its entirety. It cannot be limited to labels on definitions, but must be considered from the standpoint of the contents of such definitions in relation to the purpose of the ordinance.

We believe the primary purpose of Ordinance No. 90000 is the regulation of air contaminants in the form of solid particles, inasmuch as the measurements which are used to test air contaminants, *viz.*, the process weight table and the Ringelmann Smoke Chart, are primarily designed to measure the amount of solid particle contaminants emitted into the air. The ordinance defines "dust" as "An air contaminant consisting of *solid particles,* capable of being air-borne." (Italics ours.) "Smoke" is defined as "An air contaminant consisting of a visible air-borne concentration of *combustion produced solid particles* and other matter." (Italics ours.) We therefore conclude that, within the purview of the ordinance, "smoke" consists substantially of air-borne solid particles which fall within the definition of "dust" and that the regulation of "dust" inherently constitutes the regulation of "smoke."

The municipality of Seattle, in the exercise of its police power for the protection of the public health and welfare, may reasonably regulate the emission of air contaminants in the form of solid particles according to any reasonable classification. The question then remains whether the regulation of solid particles emitted from heat processing equipment on the basis of the process weight table and the regulation of solid particles emitted from burning conducted by the plaintiffs on the basis of the Ringelmann Smoke Chart constitute reasonable regulations based upon reasonable classifications.

It is conceivable that emissions from heat processing equipment raise problems of detecting solid particles that are not combustion produced. The Ringelmann Smoke Chart is designed primarily for the detection of combustion produced black soot particles. See Faith, Air Pollution Control, pp. 84-86 (1959). It therefore follows that the emission of solid particles from heat processing sources, conceivably, can be more effectively regulated by measuring the content of the emission by the process weight table rather than by the Ringelmann Chart.

We conclude that the use of process weight tables for the control of solid particles emitted from heat processing equipment and the use of the Ringelmann Chart for the control of solid particles emitted from other sources of burning are reasonable regulations based upon reasonable classifications. The plaintiffs have therefore failed to establish that the control exercised by the ordinance over their burning activities is discriminatory and in contravention of Art. 1, § 12 of the state constitution and the fourteenth amendment to the Federal constitution.

The plaintiffs contend that compliance with the ordinance makes it economically infeasible for a continuation of their business and that the ordinance is therefore oppressive and a taking of their property without due compensation. Economic hardships often inevitably result from laws and ordinances enacted or adopted for the protection of the public health and welfare; this, however, cannot affect their constitutional validity unless they are shown to be clearly unreasonable and

discriminatory. *Northwestern Laundry v. City of Des Moines*, 239 U.S. 486, 60 L.Ed. 396, 36 S.Ct. 206 (1915); *Chicago & Alton R. R. Co. v. Tranbarger*, 238 U.S. 67, 59 L.Ed. 1204, 35 S.Ct. 678 (1914); *Reinman v. City of Little Rock*, 237 U.S. 171, 59 L.Ed. 900, 35 S.Ct. 511 (1914). The plaintiffs have not shown that Ordinance No. 90000 is unreasonable or discriminatory, and their contention, therefore, cannot be sustained.

The other contentions raised by the plaintiffs challenging the constitutionality of the ordinance are unsupported by authority, and we find them to be without merit.

The judgment of the trial court is affirmed.

HUNTER, J.

WE CONCUR:

OTT, C. J.; HAMILTON, J.; FINLEY, J.; ROSELLINI, J.; HALE, J.

We concur in the result:

DONWORTH, J.; WEAVER, J.; HILL, J.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN SITTNER, *et al.*, *Appellants*, vs. CITY OF SEATTLE, a municipal corporation, *Respondent.*	No. 36614 *En Banc*

ORDER DIRECTING CLARIFICATION

IT IS HEREBY ORDERED That a clarification be made in the opinion filed in the above-entitled cause on August 29, 1963, appearing in 162 Wash. Dec. 819; and

That the following be substituted for the first two sentences in the last paragraph on page 822 and ending on page 823 of the opinion:

"The plaintiffs' contention is premised on the assumption that dust and smoke are different air contaminants, and that the following finding of fact of the trial court is the law of the case since no exception was taken thereto:

" 'That a logical and reasonable distinction in fact does exist between dust and smoke as defined in the ordinance.'

"We determine the foregoing purported finding of fact to involve no factual issue; that it is a construction of the ordinance and thus constitutes a conclusion of law which is not binding on this court. *Bedgisoff v. Morgan*, 23 Wn.(2d) 737, 162 P.(2d) 238 (1945). See *Kane v. Klos*, 50 Wn.(2d) 778, 788, 314 P.(2d) 672 (1957); and

cases cited therein. An examination of the ordinance on its face appears to support the plaintiffs' contention that smoke and dust are different air contaminants since smoke and dust are defined and controlled separately."

Dated this 7th day of November, 1963.

RICHARD B. OTT
Chief Justice

HILL, J.; DONWORTH, J.; FINLEY, J.; WEAVER, J.; ROSELLINI, J.; HAMILTON, J.; HALE, J.; HUNTER, J.

APPENDIX "C"

Ordinance No. 90000

AN ORDINANCE relating to air pollution, creating an air Pollution Control Advisory Board, regulating emissions of air contaminants, defining offenses and prescribing penalties.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 10. (Definitions) Certain words and terms used in this ordinance, unless clearly inconsistent with their context, shall mean as follows:

AIR CONTAMINANT. Any air-borne solid, liquid, or gaseous matter, except air or uncombined water.

AIR POLLUTION. The placing or presence in the air of air contaminants.

DUST. An air contaminant consisting of solid particles, capable of being air-borne.

FUEL BURNING EQUIPMENT. Commercial or industrial furnaces or comparable devices, the principal purpose of which is waste disposal, or the production of hot air, hot water, or steam.

HEAT PROCESSING EQUIPMENT. Industrial furnaces or comparable devices, the principal purpose of which is the processing of material through the use of heat.

PROCESS WEIGHT PER HOUR. The total weight of any material, except liquid or gaseous fuel or uncombined water, introduced into any process in one (1) hour; or, for cyclical processes, the total weight of any such matter introduced into any process during one (1) complete cycle of operation of such process, divided by the number of hours in such cycle.

SMOKE. An air contaminant consisting of a visible air-borne concentration of combustion produced solid particles and other matter.

Section 20. (Air Pollution Control Advisory Board) There shall be an "Air Pollution Control Advisory Board," the members of which shall be:

1. One person, representative of each of the following:

   American Institute of Chemical Engineers, Puget Sound Chapter

   American Society of Mechanical Engineers, Seattle Chapter

   Apartment Operators Association of Seattle

   Association of Washington Industries

   Building Owners and Managers Association of Seattle

   Construction Industry

   Environmental Research Laboratory, University of Washington

   Lumber Industry

   Seattle Chamber of Commerce

2. Five persons, representative of the general public.
3. The Director of Public Health, ex officio.
4. The Superintendent of Buildings, ex officio.
5. The Chairman of the Public Safety Committee of the City Council, ex officio.

Section 30. (Membership) Members of the Air Pollution Control Advisory Board, other than ex officio, shall be appointed by the Mayor, subject to confirmation by the City Council, and vacancies among such members

shall be filled in the same manner. Upon naming of the appointive members of the first Board, the Mayor shall designate three (3) such members to a term ending December 31, 1961, four (4) such members to a term ending December 31, 1962, three (3) such members to a term ending December 31, 1963, and four (4) such members to a term ending December 31, 1964; thereafter, such members shall be appointed for a term of four (4) years ending December 31 of the fourth year of said term.

Section 40. (Organization) The Air Pollution Control Advisory Board shall elect a Chairman, who shall serve at the pleasure of the members. Such Board may adopt rules of procedure and shall meet on call, subject to timely notice.

Section 50. (Duties) The Air Pollution Control Advisory Board shall study the control of air pollution and the administration of air pollution regulations and shall seek practical means of measuring and controlling emissions of specific air contaminants. Such board may hold hearings and make recommendations, but it shall act in an advisory capacity only.

Section 60. (Smoke) It is unlawful to cause, suffer or allow emissions of smoke from any source other than heat processing equipment, the opacity of which is equal to or more than forty per cent (40%), except as follows:

1. For a total of not more than four (4) minutes in any sixty (60) minutes, when it shall be sixty per cent (60%) or less.
2. When building a new fire, for a total of not more than twelve (12) minutes in any sixty (60)

minutes, when it shall be sixty per cent (60%) or less.

3. Temporarily, due to breakdown of equipment, and provided that repairs are promptly made.
4. During a time for compliance with this ordinance fixed by the Superintendent of Buildings as provided herein.

The per cent of opacity of emissions of smoke shall be measured by methods equivalent to those set forth in "Information Circular 7718, "Ringelmann Smoke Chart," edition of August, 1955, published by the United States Bureau of Mines (C. F. 241089), a copy of which is filed with the City Comptroller.

Section 70. (Dust from Fuel Burning Equipment) It is unlawful to cause, suffer or allow emissions of effluent from any fuel burning equipment the dust content of which is more than eighty-five hundredths (0.85) pounds of dust per one thousand (1000) pounds of effluent, adjusted to fifty per cent (50%) excess air for products of combustion, except as follows:

1. Where the dust content of the effluent is controlled through the use of dust separating equipment and provided that such equipment shall collect seventy-five per cent (75%), if installed prior to the effective date of this ordinance, or eighty-five per cent (85%) if thereafter installed, of all dust in the effluent from the fuel burning equipment.
2. Temporarily, due to breakdown of equipment and provided that repairs are promptly made.
3. During a time for compliance with this ordinance fixed by the Superintendent of Buildings as provided herein.

Section 80. (Dust from Heat Processing Equipment and Other Sources) It is unlawful to cause, suffer or allow emisisons of dust from any heat processing equipment or from the milling, grinding, crushing or handling of any material in quantities exceeding that set forth in the following table, except as follows:

1. Where the processing equipment has been installed prior to the effective date of this ordinance, and where EMISSIONS OF DUST ARE IN EXCESS OF THOSE SET FORTH IN SAID TABLE BUT ARE controlled through the use of dust separating equipment, provided, that such DUST SEPARATING equipment shall collect not less than ninety-eight and two tenths per cent (98.2%) of all dust in the effluent from the process.
2. Temporarily, due to breakdown of equipment, and provided that repairs are promptly made.
3. During a time for compliance with this ordinance fixed by the Superintendent of Buildings as provided herein.

TABLE

Process Weight Per Hour (Pounds)	*Maximum Allowable Dust Emission Per Hour (Pounds)*
100	0.60
1,000	2.95
2,000	4.75
3,000	6.35
4,000	8.00
5,000	9.65
6,000	11.30
7,000	12.90
8,000	14.30
9,000	15.50
10,000	16.65
12,000	18.70
14,000	20.40
16,000	21.60
18,000	22.80
20,000	24.00
25,000	27.40
30,000	30.90
40,000	37.00
50,000	42.50
60,000	48.00
70,000	52.50
100,000	75.00
150,000	112.50
200,000	150.00
250,000	187.50
300,000	225.00

Where the process weight per hour is between two listed figures, such process weight and maximum allowable dust emission per hour shall be interpolated accordingly.

Section 90. (Traceable Dust, Generally) It is unlawful for anyone to cause, suffer or allow the discharge of dust particles which become deposited upon the real property of others, and which are of such size and nature as to be readily recognizable and traceable to their source, except as follows:

1. Dust as specified and when regulated as set forth in Sections 70 and 80 of this ordinance.
2. Temporarily, due to breakdown of equipment, and provided that repairs are promptly made.
3. During a time for compliance with this ordinance fixed by the Superintendent of Buildings as provided herein.

Section 100. (Enforcement) The Superintendent of Buildings shall enforce this ordinance and may adopt rules and regulations pursuant thereto; he may enter any building or premises at any reasonable time to perform any of the duties imposed on him by this ordinance, and he shall inspect any premises which he may reasonably believe to be a source of air pollution.

Section 110. (Notice) If the Superintendent of Buildings finds a violation of this ordinance, he shall give particular written notice, by mail or by posting on the premises, to the owner or operator of the equipment or premises the source thereof, to comply with this ordinance within a reasonable time by him fixed.

Section 120. (Extension of Compliance Time) The

owner or operator of equipment or premises found by the Superintendent of Buildings to be the source of a violation of this ordinance may request an extension of compliance time, and if the Superintendent of Buildings shall find that immediate compliance with this ordinance is unreasonable, he shall then grant an extension of compliance time, for not more than one (1) year for any one (1) such extension. In considering a request for an extension of compliance time, the Superintendent of Buildings shall take into account such factors as practicability, availability of equipment and relative benefits to the community.

Section 130. (Hearing) The owner or operator of the equipment or premises concerned may request a hearing before the Superintendent of Buildings and the Air Pollution Control Advisory Board within ten (10) days after the date of notice of a finding by the Superintendent of Buildings that a violation of this ordinance exists, or not less than thirty (30) days before expiration of a time for compliance with this ordinance fixed by the Superintendent of Buildings as provided herein, and, within a reasonable time, such hearing shall be held.

Section 140. (After Hearing) After a hearing as provided in this ordinance the Superintendent of Buildings may find that a condition such as to cause violation of this ordinance no longer exists, or he may reaffirm his finding of a violation of this ordinance, and he may or may not grant an extension of time for compliance herewith as provided herein, but he shall do so within ten (10) days after date of such hearing.

Section 150. (Posting and Sealing) If, upon expiration of all time for compliance with this ordinance fixed

as provided herein, the Superintendent of Buildings shall find that a violation of this ordinance then exists, he shall so notify the owner or operator, and if, ten (10) days after date of such notice, the condition yet exists he shall designate the equipment or premises the source thereof, by affixing his seal, posting a notice, or otherwise, as unlawful to operate or occupy until such time as this ordinance may be complied with; provided, that within said ten (10) days, the owner or operator of such equipment or premises may appeal to the Board of Public Works from the finding of the Superintendent of Buildings, and the Board of Public Works shall hold a hearing on such appeal, and may affirm, reverse or modify the finding of the Superintendent of Buildings; and, pending a decision by the Board of Public Works on said appeal, the Superintendent of Buildings shall take no action to designate such equipment or premises as unlawful to operate or occupy.

Section 160. (Unlawful Use) It is unlawful to operate any equipment, or to occupy any premises, designated as unlawful to operate or occupy by the Superintendent of Buildings as provided in this ordinance, except upon his written authority so to do.

Section 170. (Penalty) Anyone violating or failing to comply with this ordinance, upon conviction thereof, shall be punished by a fine of not more than Three Hundred Dollars ($300.00), or by imprisonment for not more than ninety (90) days, or by both such fine and imprisonment, and each day that anyone shall continue to violate or fail to comply with this ordinance shall be a separate offense.

Section 180. (Severability) Should any section, subsection, paragraph, sentence, clause or phrase of this ordinance be declared unconstitutional or invalid for any reason, such decision shall not affect the validity of the remaining portions of this ordinance.

Section 190. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed by the City Council the 6th day of February, 1961, and signed by me in open session in authentication of its passage this 6th day of February, 1961.

DAVID LEVINE
President of the City Council.

Approved by me this 9th day of February, 1961.

GORDON S. CLINTON
Mayor.

Filed by me this 9th day of February, 1961.

Attest: C. G. ERLANDSON
City Comptroller and City Clerk.

(Seal) By W. A. PERINE
Deputy Clerk.

Date of official publication in the *Daily Journal of Commerce*, Seattle, February 18, 1961.

Office-Supreme Court, U.S.
FILED
MAR 27 1964
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 881

RECEIVED
MAR 27 1964
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOHN SITTNER, d/b/a SITTNER'S AUTO WRECKING; FRANK LENCI, d/b/a FRANK'S AUTO WRECKING CO.; FITZ AUTO PARTS, INC.; RIVERSIDE AUTO WRECKING; LINCOLN AUTO AND TRUCK WRECKING; TRUCK EQUIPMENT CO.; FERRILL'S AUTO WRECKING; EDWARD J. PRESTEK; M. BLOCH AND CO. INC.; BOB'S AUTO WRECKING; GENERAL AUTO AND TRUCK WRECKING; SEATTLE IRON AND METALS CORP.; LURIA BROS. AND CO., INC.; STERNOFF METALS CORP.; PACIFIC IRON AND METAL CO.; REX AUTO WRECKING; ANDERSON'S AUTO WRECKING; SOUTH END AUTO WRECKING; NEWTON AUTO PARTS; JOE W. MCCUTCHEN; COMMERCIAL TERMINALS CO.; M. G. VAN DYKE; SAM'S BONDED AUTO WRECKERS; L. E. SEXTON; and FARWEST AUTO WRECKING CO., INC.,
Petitioners,

vs.

CITY OF SEATTLE, a municipal corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Seattle, Washington 98104

THE ARGUS PRESS, SEATTLE, WASHINGTON

In the
Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

JOHN SITTNER, d/b/a SITTNER'S AUTO WRECKING; FRANK LENCI, d/b/a FRANK'S AUTO WRECKING CO.; FITZ AUTO PARTS, INC.; RIVERSIDE AUTO WRECKING; LINCOLN AUTO AND TRUCK WRECKING; TRUCK EQUIPMENT CO.; FERRILL'S AUTO WRECKING; EDWARD J. PRESTEK; M. BLOCH AND CO. INC.; BOB'S AUTO WRECKING; GENERAL AUTO AND TRUCK WRECKING; SEATTLE IRON AND METALS CORP.; LURIA BROS. AND CO., INC.; STERNOFF METALS CORP.; PACIFIC IRON AND METAL CO.; REX AUTO WRECKING; ANDERSON'S AUTO WRECKING; SOUTH END AUTO WRECKING; NEWTON AUTO PARTS; JOE W. MCCUTCHEN; COMMERCIAL TERMINALS CO.; M. G. VAN DYKE; SAM'S BONDED AUTO WRECKERS; L. E. SEXTON; and FARWEST AUTO WRECKING CO., INC.,
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INDEX

Question Presented	2
Statement	2
Reasons for Denying the Writ	3
Conclusion	7

TABLE OF CASES

Board of Health v. New York Central Ry. Co., 4 N.J. 293, 72 A.(2d) 511 (1950)	6
City of Brooklyn v. Nassau Elec. Ry. Co., 44 App. Div. 462, 61 N.Y.S. 33	7
Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 4 L.ed.(2d) 852, 80 S.Ct. 813	3
McGowan v. Maryland, 366 U.S. 420, 6 L.ed.(2d) 393, 81 S.Ct. 1101	3
Moses v. U. S., 16 App. D.C. 428, 50 L.R.A. 532	6
Northwestern Laundry v. Des Moines, 239 U.S. 486, 60 L.ed. 396, 36 S.Ct. 206	3
People v. International Steel Corp., 102 Cal. App. Sup. 935, 226 P.(2d) 587	6
State v. Chicago, Mil. & St. Paul Ry., 114 Minn. 122, 130 N.W. 545 (1911)	6
State v. Tower, 185 Mo. 79, 84 S.W. 10	6
State ex rel. McCue v. Sheriff of Ramsey County, 48 Minn. 236, 51 N.W. 112 (1892)	5

CONSTITUTION

United States Constitution, Fourteenth Amendment	2

ORDINANCE

Seattle Ordinance 90000	2, 4, 5

COURT RULES

Revised Rules of the Court, Rule 19	7
Rule 24	1

In the
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vs.

CITY OF SEATTLE, a municipal corporation, *Respondent*.

No.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent The City of Seattle, pursuant to Rule 24 of the Revised Rules of this Court, herewith submits its brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of the State of Washington herein.

QUESTION PRESENTED

The sole question presented by Petitioners' Application for Writ of Certiorari is whether Ordinance 90000 of The City of Seattle, Washington, in regulating emissions from "heat processing equipment" by means of weight control rather than visual control which applies to other sources of air contaminants, is repugnant to the Fourteenth Amendment of the United States Constitution on the ground that such classification for purposes of regulation is unreasonable.

STATEMENT

With respect to the classification here, the trial court in its memorandum decision (R. 0254) stated as follows:

> "Now the fact that the city has determined that some emissions should be measured by their opacity and some by weight does not violate the accepted provisions, case law, when measured against the terms of distinction based upon reasonable grounds. I do not find as a matter of law any class discrimination. As a matter of fact I believe there is a real and substantial difference between the emission of dust from heat processing equipment and the emission of smoke from other sources, for the reason that the former are necessary results of manufacturing processes during which substantial material changes form and the latter is chiefly the result of the disposal of waste matter or the inefficient operation of heating facilities. I believe that in form and in fact that this is a reasonable distinction to be made with a definite and acceptable place in practice and in fact. I believe that

The City of Seattle under the cases has the right, should it so choose, to make that determination. In my opinion the need of each class of business must be and undoubtedly has been considered. For this reason heat processing equipment has been treated separately, not only because its effluent is better measured in terms of weight than in the instance of smoke but in this legislative determination the people have determined that the need is greater in the one case when compared to the public health and safety and the demand of this city than in the other, and I find nothing in that conclusion contrary to the form and spirit of our case law."

REASONS FOR DENYING THE WRIT

That air pollution is a proper subject for control by the municipal police power is not subject to question. As stated by this Court in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L.ed.(2d) 852, 80 S.Ct. 813:

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."

See also *Northwestern Laundry v. Des Moines*, 239 U.S. 486, 60 L.ed. 396, 36 S.Ct. 206.

The standard of judicial review of legislative enactments against allegations of unreasonable classification is familiar. As stated in *McGowan v. Maryland*, 366 U.S. 420, 6 L.ed.(2d) 393, 81 S.Ct. 1101:

> "The standards under which this proposition is to be evaluated have been set forth many times by

this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Port Pilot Comrs.*, 330 U.S. 552, 91 L.ed. 1093, 67 S.Ct. 910; *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 79 L.ed. 1070, 55 S.Ct. 538; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L.ed. 369, 31 S.Ct. 337, Ann. Cas. 1912C 160; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96, 43 L.ed. 909, 19 S.Ct. 609."

In this case Petitioners' business activities include the burning of salvaged metals by twenty of said Petitioners as an incident of the auto wrecking business. The emissions of smoke from such burning process are regulated under Seattle Ordinance 90000 by the use of the "Ringelmann Smoke Chart," a method of visual measurement of air contaminants. Petitioners complain that the measurement of emissions from "heat processing equipment," defined in said ordinance as "industrial furnaces or comparable devices, the principal purpose of which is the processing of material through the use of heat," by use of a weight table rather than by a visual smoke chart, constitutes an unreasonable classi-

fication, and is therefore contrary to the United States Constitution.

It must be emphasized that Seattle Ordinance 90000 does not *exempt* emissions from heat processing equipment from regulation but simply measures the emission therefrom by weight rather than the visual process.

As clearly pointed out by the trial court, such classification is based on the fact that emissions from heat processing equipment can be better regulated by weight control than by visual control methods.

Petitioners cite but one case in support of their Petition, *State ex rel. McCue v. Sheriff of Ramsey County*, 48 Minn. 236, 51 N.W. 112, which was decided in 1892. In that case a smoke control act completely exempted from its application all "manufacturing establishments using the entire product of combustion, and the heat, power, and light produced thereby, within the building, where they are generated or within a radius of three hundred feet therefrom."

The Court stated at page 113 that the "only fair and reasonable construction to be given it (the Act) is that it is intended to except a class of manufacturers who limit the use of the heat, light and power resulting from the combustion of smoke-producing material wholly within the prescribed radius," and concluded that the classification "was not sufficiently broad" and was "arbitrary" and held the act invalid.

The case at bar is distinguishable because the Seattle ordinance regulates all emissions of dust and smoke, the classification being one based on the type of equipment

producing the emission of air contaminants and then only for the purpose of measurement thereof.

Following are cases illustrative of instances in which legislative classifications have been upheld with respect to smoke control ordinances:

In *People v. International Steel Corp.*, 102 Cal. App. Sup. 935, 226 P.(2d) 587, the California Court upheld a regulation which exempted completely certain agricultural operations and set forth special rules for application to certain orchard heaters, and observed that nothing in the record upset the presumption that such classification was reasonable.

In *Moses v. U. S.*, 16 App. D.C. 428, 50 L.R.A. 532, an Act of Congress regulating the emission of smoke within the District of Columbia was upheld as nondiscriminatory despite the fact that emissions from private dwellings were totally excluded, the Court of Appeals observing that all parties within the respective classes were treated alike.

In *State v. Tower*, 185 Mo. 79, 84 S.W. 10, the Missouri Court upheld a smoke control ordinance which expressly exempted from its operation smoke emitted from locomotives and steamboats.

In *Board of Health v. New York Central Ry. Co.*, 4 N.J. 293, 72 A.(2d) 511 (1950), it was held that smoke emitted from one and two-family residences could lawfully be excluded from a smoke control ordinance.

In *State v. Chicago, Mil. & St. Paul Ry.*, 114 Minn. 122, 130 N.W. 545 (1911), an ordinance relating to the use of soft coal and excluding locomotives from its op-

eration was upheld as setting forth a reasonable classification.

In *City of Brooklyn v. Nassau Elec. Ry. Co.*, 44 App. Div. 462, 61 N.Y.S. 33, legislation prohibiting the burning of soft coal within four miles of the City Hall, with certain exceptions, was upheld against the argument that such constituted an unreasonable classification.

CONCLUSION

Petitioners have presented no argument to support a grant of their Petition for Certiorari because of "special and important reasons therefor" and Petitioners have failed to show that a federal question of substance is presented or that the decision of the Washington State Supreme Court is inconsistent with any applicable decision of the United States Supreme Court as contemplated by Rule 19 of the Revised Rules of this Court, and Respondent therefore respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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